

BEFORE LINDA MCCULLOCH, SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

BOARD OF TRUSTEES OF KG PUBLIC,)	
SCHOOLS, HIGH SCHOOL DISTRICT)	OSPI 295-03
"H" AND JOHN BALLARD,)	
)	
Appellant,)	
)	DECISION AND ORDER
)	
vs.)	
)	
CR,)	
)	
Respondent.)	
)	

Having reviewed the record and considered the parties' briefs, the Superintendent of Public Instruction issues the following Decision and Order.

DECISION AND ORDER

That portion of the April 24, 2003 decision by the Hill County Superintendent of Schools determining that the County Superintendent did not have jurisdiction to hear CR's (Respondent's) appeal is hereby AFFIRMED. The remaining portion of the April 24th decision is hereby VACATED.

PROCEDURAL HISTORY

This is an appeal by the Board of Trustees of KG Public Schools, High School District "H", and John Ballard ("the District") of an Order issued by the County Superintendent of Schools ("County Superintendent") dated April 24, 2003.

Respondent filed an appeal of a disciplinary suspension to the County Superintendent on April 9, 2003. The District filed a Motion to Dismiss alleging that the County Superintendent had no jurisdiction to hear the appeal. The County Superintendent issued an Order on April 24, 2003 acknowledging that she had no jurisdiction to hear the appeal and ordered that the matter be remanded to the District with instructions to make a final decision on the December 16, 2002 hearing or hold a new hearing no later than the next regular board meeting and that Trustee Dees was to abstain from the decision making process.

The District filed a Notice of Immediate Appeal to this office on May 23, 2003.

The County Superintendent's Order is the subject of this appeal. The issue on appeal is: Whether the County Superintendent erred in remanding the matter and imposing conditions after a finding that she did not have jurisdiction to hear the appeal.

STANDARD OF REVIEW

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. §2-4-704 and adopted by the State Superintendent in Admin. R. Mont. 10.6.125. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed to determine if the correct standard of law was applied. *Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy Keenan*, 241 Mont. 274, 277, 786 P.2d 1164, 1166 (1990) and *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, at 474, 803 P.2d 601, 603 (1990).

The State Superintendent may not substitute her judgment for that of a county superintendent as to the weight of the evidence on questions of fact. Findings are upheld if supported by substantial, credible evidence in the record. A finding is clearly erroneous only if a "review of the record leaves the Court with the definite and firm conviction that a mistake has been committed." *Wage Appeal v. Board of Personnel Appeals*, 208 Mont. 33, at 40, 676 P.2d 194, at 198 (1984).

Conclusions of law are subject to more stringent review. The Montana Supreme Court held that conclusions of law are reviewed to determine if the agency's interpretation of the law is correct. *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, at 474, 803 P.2d at 603 (1990).

The State Superintendent may reverse or modify the County Superintendent's decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (g) affected because findings of fact upon issues essential to the decision were not made although requested. Admin. R. Mont. 10.6.125(4).

FACTUAL SUMMARY

1. Respondent was enrolled as a high school student at KG Public Schools during the 2002-2003 school year.
2. Respondent received a disciplinary 3-day in school suspension which was reduced by Superintendent Ballard to 1 day on September 27, 2002.
3. Respondent requested that he be allowed to provide information regarding the subject incident to the Board of Trustees and that his record be cleared of this incident. Respondent's request to provide information to the Board was granted. Respondent's attorney presented information and evidence at the December 16, 2002 school board meeting.
4. The board made no decision at the December 16th meeting and took the matter under advisement.
5. On February 20, 2003 the District's attorney sent a letter to Respondent's attorney stating: "The Board listened to the information you provided regarding the disciplinary matter at issue and took no action. The Board of Trustees considers this matter closed."
6. On April 9, 2003, Respondent filed a Notice of Appeal with the Hill County Superintendent.

OPINION

Did the County Superintendent err in remanding the matter and imposing conditions after a finding that she did not have jurisdiction to hear the appeal?

Appellant alleges that having found she had no jurisdiction to hear the appeal, the County Superintendent had no authority to remand the case to the Board of Trustees or impose restrictions on the board. Respondent argues that ARM 10.6.104(2) provides the County Superintendent to make such orders as are necessary to suit the circumstances of the case and to "require a reluctant board to do its job".

Sub-chapter 1 of Title 10, Chapter 6 of the Administrative Rules of Montana contains the "Rules of Procedure for all School Controversy Contested Cases before the County Superintendents of the State of Montana."

ARM 10.6.103(1) provides that: "A person who has been aggrieved by a final decision of the board of trustees of a school district in a contested case is entitled to commence an appeal before the county superintendent."

In this matter, both parties acknowledge that the Board of Trustees has not issued a final decision from which an appeal could be taken. It is clear that Respondent was not "entitled to commence an appeal before the county superintendent" in this matter.

Pursuant to ARM 10.6.104 upon receipt of a notice of appeal the county superintendent is to determine whether the appeal is a contested case and whether he/she has jurisdiction. The County Superintendent, in her order dated April 24, 2003, determined that the Board had not made a final decision, there was no contested case and that she would not have jurisdiction until a decision had been made. Once that determination is made the County Superintendent does not have the power to act or issue further orders in connection with the issue appealed. Jurisdiction must be denied and the Notice of Appeal returned to the Appellant. ARM 10.6.104(3)

Respondent alleges that the language contained in ARM 10.6.104(2) provides the County Superintendent with authority to make additional orders. This is not the case. Subsection (2) provides that the rules of procedure apply in connection with questions of jurisdiction and that the County Superintendent can issue rulings and orders in connection with the determination of jurisdiction. Once the determination has been made that there is no jurisdiction, this provision no longer applies.

The County Superintendent has "general supervision of the schools of the county within the limitations prescribed by [Title 20]." MCA §20-3-205. Instructing the Board of Trustees in the performance of their duties is not one of the listed duties of a County Superintendent. A County Superintendent may assist trustees with school supervision, but only those schools which

do not employ a principal or district superintendent. MCA §20-3-207.

The State Superintendent determines that the orders contained in the County Superintendent's Order dated April 24, 2003 are in excess of statutory authority, made upon unlawful procedure, and are a clearly unwarranted exercise of discretion. ARM 10.6.125(4).

CONCLUSION

That portion of the April 24, 2003 decision by the Hill County Superintendent of Schools determining that the County Superintendent did not have jurisdiction to hear CR's appeal is hereby **AFFIRMED**. The remaining portion of the April 24th decision is hereby **VACATED**.

Dated this 8th day of December, 2003.

/s/ Linda McCulloch
LINDA MCCULLOCH
Superintendent of Public Instruction

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 8th day of December, 2003, I caused a true and exact copy of the foregoing "DECISION AND ORDER" to be mailed, postage prepaid, to the following:

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